

PUBLIC UTILITIES COMMISSION

505 VAN NESS AVENUE
SAN FRANCISCO, CA 94102-3298

October 14, 2022

Agenda ID #21048
Ratesetting~~TO PARTIES OF RECORD IN APPLICATION 15-05-014, et al.:~~

~~This is the proposed decision of Administrative Law Judge Peter Wercinski. Until and unless the Commission hears the item and votes to approve it, the proposed decision has no legal effect. This item may be heard, at the earliest, at the Commission's November 17, 2022 Business Meeting. To confirm when the item will be heard, please see the Business Meeting agenda, which is posted on the Commission's website 10 days before each Business Meeting.~~

~~Parties to the proceeding may file comments on the proposed decision as provided in Rule 14.3 of the Commission's Rules of Practice and Procedure.~~

~~The Commission may hold a Ratesetting Deliberative Meeting to consider this item in closed session in advance of the Business Meeting at which the item will be heard. In such event, notice of the Ratesetting Deliberative Meeting will appear in the Daily Calendar, which is posted on the Commission's website. If a Ratesetting Deliberative Meeting is scheduled, *ex parte* communications are prohibited pursuant to Rule 8.2(c)(4).~~

/s/ MICHELLE COOKE
Michelle Cooke
Acting Chief Administrative Law Judge

MLC:nd3
Attachment

ALJ/PWI/nd3

PROPOSED DECISION Agenda ID #21048 (Rev.1)

Ratesetting

11/17/2022 Item #14

Decision **PROPOSED DECISION OF ALJ WERCINSKI (Mailed 10/14/2022)**

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Application of the City of Santa Rosa
for Approval to Construct a Public
Pedestrian and Bicycle At-Grade
Crossing of the Sonoma-Marin Area
Rail Transit (SMART) Track at
Jennings Avenue Located in Santa
Rosa, Sonoma County, State of
California.

Application 15-05-014

And Related Matter.

Case 21-06-011

**DECISION DENYING RAIL SAFETY DIVISION'S PETITION
FOR MODIFICATION OF DECISION 16-09-002**

Summary

We deny Rail Safety Division's Petition for Modification (PFM) of Decision (D.) 16-09-002, which approved an at-grade crossing at Jennings Avenue in Santa Rosa, because the PFM fails to present any evidence of new or changed facts specific to the Jennings Avenue location and fails to address the seven-factor test of impracticability for a separated grade crossing set forth in D.16-09-002.

Application 15-05-014 is closed. Case 21-06-011 remains open.

1. Background

In Application (A.) 15-05-014, the City of Santa Rosa (the City) requested Commission approval for an at-grade crossing of the rail tracks of Sonoma-Marín Area Rail Transit (SMART) at Jennings Avenue in Santa Rosa. In Decision (D.) 16-09-002, the Commission approved the application for a three-year period, with the conclusions of law that: (1) a rail crossing at Jennings Avenue is in the public interest and there is a public need for the crossing; (2) local community and emergency authorities and the general public support an at-grade crossing; (3) the unique facts of the Jennings Avenue crossing overcome the presumption against an at-grade crossing; (4) Commission precedent in factually similar crossings supports an at-grade crossing; (5) it is impracticable to construct a grade-separated overcrossing at Jennings Avenue; and (6) the City has convincingly shown that it has eliminated all potential safety hazards.¹

On April 19, 2019, the City filed a Petition for Modification of D.16-09-002 (2019 PFM) to extend the period for construction of the at-grade crossing at Jennings Avenue. The Commission's Safety and Enforcement Division (SED) opposed the 2019 PFM, arguing that the petition makes significant changes to the proposals approved in D.16-09-002 that had not been adequately reviewed for their potential safety impact.² SMART, which had not previously been a party to A.15-05-014, became a party by filing an opposition to the 2019 PFM. In its opposition, SMART argues that "the only safe crossing at the Jennings Avenue location is a grade separated crossing and that an at-grade crossing is unnecessarily dangerous."³ In addition, SMART argues against the extension of the Jennings Avenue at-grade authorization expiration date because conditions

¹ D.16-09-002 Conclusion of Law (COL) 4-6 and 8-11.

² SED Opposition to 2019 PFM at 1.

³ SMART Response to 2019 PFM at 3.

had changed after the Commission's approval in D.16-09-002, including the construction of a multi-use path parallel to the right-of-way connecting the College Avenue to the Guerneville Road crossings and the reconstruction of the pedestrian and bicycle at-grade crossing at Guerneville Road.⁴ In D.19-10-002, the Commission granted the 2019 PFM and extended the authorization for an at-grade crossing at Jennings Avenue to September 20, 2021.⁵ In doing so, the Commission rejected the arguments of SED and SMART, noting that the Commission had made a robust inquiry into the comparative safety hazards and risks of an at-grade and a grade-separated crossing at Jennings Avenue and had thoroughly considered the parties' positions before the issuance of D.16-09-002.⁶

On July 16, 2021, the City filed a second PFM (2021 PFM) to extend the authorization expiration date for an at-grade crossing at Jennings Avenue to September 20, 2023. In its response to the 2021 PFM, the Commission's Rail Safety Division (RSD)⁷ argues that accidents on SMART's rail property line since SMART began operations in 2017 demonstrate that the Jennings Avenue at-grade crossing is not safe.⁸ In D.21-10-003, the Commission granted the City's 2021 PFM and extended the authorization period for construction of the Jennings Avenue at-grade crossing to September 20, 2023.⁹ In that decision, the Commission (1) states that there was insufficient time to litigate the incidents raised by RSD in light of the impending expiration of the authorization to construct the at-grade

⁴ *Id.* at 4-6.

⁵ D.19-10-002 at 9 and Ordering Paragraph (OP) 1-2.

⁶ *Id.* at 7-8.

⁷ RSD explains that it was a part of SED at the time of the original application in this proceeding. RSD Response to 2021 PFM at fn. 1.

⁸ *Id.* at 8.

⁹ D.21-10-003 at 10 and OP 1-2.

crossing; and (2) notes that RSD or any party alleging new or changed facts should file a petition for modification pursuant to Rule 16.4(b) of the Commission's Rules of Practice and Procedure (Rules).¹⁰

On January 24, 2022, RSD filed the Petition for Modification (PFM) of D.16-09-002 addressed in this decision. The PFM references "new information that was not known or capable of being known at the time the Commission issued D.16-09-002," including: (1) SMART's operation of a passenger rail line beginning in 2017, with 26 trains per day as of the filing of the PFM; and (2) nine incidents between 2017 and 2020 on SMART's rail line involving pedestrians or bicyclists, including two accidents involving individuals wearing headphones or earbuds, three incidents in which bicyclists approached a crossing but did not slow down or stop before the train approached, and one incident in which a pedestrian was fatally injured while trying to beat a train across the tracks at an at-grade crossing.¹¹ In addition, RSD notes three incidents that involved suicides and argues that a Jennings Avenue at-grade crossing will become another location at which vulnerable people may attempt or commit suicide.¹² RSD acknowledges that there were no pedestrian or bicyclist accidents along SMART's rail line in 2021.¹³ RSD urges the Commission to determine that an at-grade crossing at Jennings Avenue presents an unreasonable risk of harm to the public and should not be opened.¹⁴

¹⁰ *Id.* at 10.

¹¹ PFM at 4-8.

¹² *Id.* at 8.

¹³ *Ibid.*

¹⁴ *Id.* at 3, 8-9.

On March 10, 2022, Sonoma County Transportation, Land Use Coalition, Sierra Club, Friends of SMART, and Stephen C. Birdlebough (collectively, Joint Parties) filed a joint response and parties City and James L. Duncan each filed a response opposing the PFM. On March 10, 2022, SMART filed a response supporting the PFM. On March 21, 2022, Joint Parties filed a joint reply and RSD, James L. Duncan, and City each filed a reply regarding the PFM.

2. Standard of Review

Public Utilities (Pub. Util.) Code Section 1708 provides that the Commission may “rescind, alter, or amend any order or decision made by it.” Modifying an existing decision is an extraordinary remedy that must be carefully applied because Pub. Util. Code Section 1708 represents a departure from the standard that settled expectations should be allowed to stand undisturbed.¹⁵

Under Rule 16.4, a PFM may be filed to ask the Commission to make changes to an issued decision.¹⁶ However, a claim that a Commission decision is unlawful or erroneous must be made through an application for rehearing, not a PFM.¹⁷

Although the Commission will not consider issues that are simply the re-litigation of issues previously decided by the original decision, allegations of new or changed facts may be raised in a PFM.¹⁸ Allegations of new or changed facts must be supported by an appropriate declaration or affidavit.¹⁹

¹⁵ D.21-10-003 at 3.

¹⁶ Rule 16.4(a).

¹⁷ Rule 16.1(c).

¹⁸ D.21-10-003 at 3.

¹⁹ Rule 16.4(b).

A PFM generally must be filed and served within one year of the effective date of the decision to be modified. If more than one year has elapsed, the PFM must explain why it could not have been presented within one year of the effective date of the decision.²⁰

3. Discussion

3.1. Timeliness of PFM

RSD's PFM was filed in January 2022, more than five years after the Commission's decision in D.16-09-002. However, as described in Section 1 above, D.16-09-002 was modified in October 2019 in D.19-10-002 and in October 2021 in D.21-10-003. We conclude that the modifications to D.16-09-002 effectively restarted the one-year period within which to file a PFM under Rule 16.4(d), an interpretation that is consistent with the Commission's statement in D.21-10-003 that any party alleging new or changed facts should file a PFM. Because RSD filed its PFM within four months of the Commission's decision in D.21-10-003, we find that RSD did timely file the PFM. As a result, we turn to the merits of the PFM.

3.2. PFM's Absence of New or Changed Facts Specific to the Jennings Avenue Crossing

Under Rule 16.4(a)-(b), a petition for modification asks the Commission to make changes to a decision based upon allegations of new or changed facts that must be supported by an appropriate declaration. RSD submitted the declaration of David Stewart (Stewart), a Commission Rail Crossings and Engineering Branch Utilities Engineer, in support of the PFM. Stewart reviewed all incidents that occurred on SMART's property since 2017 based upon reports filed with the Commission,²¹ and the declaration describes nine incidents "that occurred on

²⁰ Rule 16.4(d).

SMART's rail line" between October 2017 and July 2020.²² However, all nine incidents concern locations in Sonoma County and Marin County other than Jennings Avenue in Santa Rosa, and the declaration does not purport to establish any causal connection between the Commission's approval of the Jennings Avenue at-grade crossing in D.16-09-002 and the nine incidents.

RSD's PFM is based entirely on the premise that factual allegations concerning any part of SMART's rail line constitute "new or changed facts" that are sufficient under Rule 16.4 to support a PFM. We disagree. The Commission's authorization in D.16-09-002 was not an authorization to act on any part of SMART's rail line, which extends through Sonoma County and Marin County. Instead, D.16-09-002 specifically focuses on the historical use of the Jennings Avenue location,²³ access to the Jennings Avenue crossing,²⁴ the design for a grade-separated crossing at Jennings Avenue, including the safety, visual, and aesthetic concerns raised by parties,²⁵ and the design for an at-grade crossing at Jennings Avenue.²⁶ D.16-09-002 unequivocally declares that "the ultimate issue to be addressed in this proceeding is whether the at-grade track crossing proposed for Jennings Avenue is in compliance with applicable Commission safety rules, procedures, guidelines and criteria."²⁷ OP 1 of D.16-09-002 approves "[t]he

²¹ Declaration of David Stewart in Support of the Rail Safety Division's Petition to Modify Decision 16-09-002 Regarding the Jennings Avenue Crossing in Santa Rosa (Stewart Declaration) at para. 6.

²² Stewart Declaration at para. 7.

²³ D.16-09-002 at 14-15.

²⁴ *Id.* at 17-18.

²⁵ *Id.* at 19-21.

²⁶ *Id.* at 21-22.

²⁷ *Id.* at 22.

application of the City of Santa Rosa for an at-grade crossing at Jennings Avenue in Santa Rosa.” Thus, the PFM’s “new or changed facts” must relate specifically to the Jennings Avenue location. However, the PFM completely lacks any factual assertions directly tied to Jennings Avenue. As a result, the PFM must fail.

3.3. PFM’s Failure to Address Seven-Factor Test of Impracticability

Under the “seven-factor” test, the Commission evaluates the impracticability of a separated grade crossing through consideration of the following factors:

1. A demonstration of public need for the crossing;
2. A convincing showing that all potential safety hazards have been eliminated;
3. The concurrence of local community and emergency authorities;
4. The opinions of the general public, and specifically those who may be affected by an at-grade crossing;
5. A recommendation by Staff that it concurs in the safety of the proposed crossing, including any conditions;
6. Although less persuasive than safety considerations, the comparative costs of an at-grade crossing with a grade separation; and
7. Commission precedent in factually similar crossings.²⁸

D.16-09-002 concludes that the seven-factor test of impracticability of a separated grade crossing applies to the Jennings Avenue location.²⁹ After applications for rehearing, the Commission affirmed that D.16-09-002 had

²⁸ *Id.* at 28-29.

²⁹ *Id.* COL 2-3.

properly followed precedent in applying the seven-factor test of impracticability to the Jennings Avenue crossing.³⁰

Despite the clear direction in D.16-09-002 to apply the seven-factor test to the Jennings Avenue location, the PFM does not even mention the seven-factor test. In addition, the PFM fails to conduct any analysis of the seven factors to support its contention that the Jennings Avenue at-grade crossing should not be opened. Thus, even if the nine incidents cited in the PFM could be considered new or changed facts, the PFM completely lacks the required legal framework for the Commission to fully and properly evaluate the merits of the petition. Because of its failure to address the seven factors, the PFM must be denied.

4. Denial of Pending Motions

All pending motions are denied as moot in light of this decision.

5. Comments on Proposed Decision

The proposed decision of Administrative Law Judge Peter Wercinski was mailed to the parties in accordance with Pub. Util. Code Section 311, and comments of the parties were allowed under Rule 14.3. Comments were filed on

_____ ~~by~~ _____ November 3, 2022 by RSD, SMART, and
the City, and reply comments were filed on _____ ~~by~~
_____ November 8, 2022 by the City and James L. Duncan.

We dismiss the comments of RSD and SMART regarding the relevance of
incidents that are not specific to the Jennings Avenue location because those
arguments were thoroughly addressed in the proposed decision. We also reject
RSD's explanation that it failed to address the seven-factor test in its PFM
because that test "was specific to determining whether a grade-separated

³⁰ D.17-08-017 at 3-4.

crossing was practicable, not whether an at-grade crossing is safe.”³¹ To the contrary, the seven factors require the Commission to compare a grade-separated crossing to an at-grade crossing, including whether there has been a convincing showing that all potential safety hazards have been eliminated.³² In its comments, RSD also mistakenly claims that the proposed decision treats the seven-factor criteria “as the entirety of the Commission’s decision-making process regarding rail crossings.”³³ However, as the proposed decision makes clear, the Commission’s decision-making process that resulted in granting the application was not limited to the seven factors but also focused on facts specific to the Jennings Avenue location, a focus that was wholly absent in the PFM. As a result, we do not find any basis for making the changes to the proposed decision offered by RSD and SMART.

6. Assignment of Proceeding

Genevieve Shiroma is the assigned Commissioner and Gerald Kelly and Peter Wercinski are the assigned Administrative Law Judges in this proceeding.

Findings of Fact

1. RSD filed the PFM on January 24, 2022, within four months after the issuance of D.21-10-003 that granted the City’s 2021 PFM.

³¹ RSD’s Comments on the Proposed Decision Denying the PFM at 7.

³² In contrast to RSD’s view that the seven-factor test applies only to a grade-separated crossing, SMART acknowledges in its opposition to the proposed decision that the seven-factor analysis does consider factors concerning the Jennings Avenue at-grade crossing. Comments of SMART on the Proposed Decision Denying the PFM at 2-3. SMART’s subsequent comments addressing the seven factors do not change our conclusion that the PFM itself is deficient and should be denied for the reasons set forth in the proposed decision.

³³ RSD’s Comments on the Proposed Decision Denying the PFM at 7.

2. The PFM references nine incidents between 2017 and 2020 on SMART's rail line in Sonoma County and Marin County but no incidents specific to the Jennings Avenue crossing in Santa Rosa.

3. The PFM does not reference the seven-factor test of impracticability of a separated grade crossing set forth in D.16-09-002.

Conclusions of Law

1. The PFM should be decided on the merits because RSD timely filed the PFM.

2. The PFM should be denied because it fails to allege new or changed facts specific to the Jennings Avenue crossing in Santa Rosa.

3. The PFM should be denied because it fails to address the seven-factor test of impracticability of a separated grade crossing as set forth in D.16-09-002.

4. This decision should be effective immediately.

5. A.15-05-014 should be closed.

6. Case 21-06-011 should remain open.

O R D E R

IT IS ORDERED that:

1. The petition for modification of Decision 16-09-002 filed by the Rail Safety Division is denied.

2. This decision is effective immediately.

3. Application 15-05-014 is closed.

4. Case 21-06-011 remains open.

This order is effective today.

Dated _____, at San Francisco, California.

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